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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Trevor Davis Missell,

Plaintiff,

vs.

Carolyn W. Colvin, Acting Commissioner  
of Social Security,

Defendant.

No. CV 13-8226-PCT-JAT

**ORDER**

Plaintiff filed for social security disability benefits. After a hearing before an Administrative Law Judge (“ALJ”), Plaintiff’s application was denied. Doc. 11-3 at 14-25. Plaintiff has appealed that denial to this Court.

Plaintiff alleges three claims of error on appeal: 1) the ALJ improperly rejected the testimony of the treating physician; 2) the ALJ misinterpreted the opinion of a consulting physician; and 3) the ALJ did not have substantial evidence upon which to discredit the testimony of Plaintiff. Doc. 12 at 2.

**I. Factual background**

The parties are familiar with the factual background in this case, and it is summarized in the ALJ’s decision. Doc. 11-3 at 14-25. Therefore, the Court will reference it only as necessary to the decision below.

**II. Review of ALJ’s Decision**

The ALJ’s decision to deny benefits will be overturned “only if it is not supported by

substantial evidence or is based on legal error.” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9<sup>th</sup> Cir. 1989). In determining whether there is substantial evidence to support a decision, this Court considers the record as a whole, weighing both the evidence that supports the ALJ’s conclusions and the evidence that detracts from the ALJ’s conclusions. *Id.* If there is sufficient evidence to support the ALJ’s determination, the Court cannot substitute its own determination. *See Young v. Sullivan*, 911 F.2d 180, 184 (9<sup>th</sup> Cir. 1990). Additionally, the ALJ is responsible for resolving conflicts in medical testimony, determining credibility, and resolving ambiguities. *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). Thus, if on the whole record before this Court, substantial evidence supports the ALJ’s decision and the decision is free of legal error, this Court must affirm it. *See Hammock v. Bowen*, 879 F.2d 498, 501 (9<sup>th</sup> Cir. 1989); *see also* 42 U.S.C. § 405(g).

### III. Claims of Error on Appeal

Before the Court turns to the particular claims of error on appeal, the Court notes that an overarching argument of Plaintiff appears to be that the ALJ did not properly address Plaintiff’s substance abuse. The Government has summarized the law regarding the ALJ’s obligations regarding a claimant’s substance abuse as follows:

In cases where an ALJ finds that a claimant who is abusing drugs or alcohol is disabled, she must undertake a “DAA” analysis as to whether such substance abuse is material to the finding of disability. *See* 20 C.F.R. § 404.1535; *see also* 42 U.S.C. § 1382c(a)(3)(J); Social Security Ruling (SSR) 13-2p, 78 Fed. Reg. 11,939, 11,941 (Feb. 20, 2013). If the ALJ determines pursuant to the DAA analysis that the individual would not be found disabled absent the substance abuse, then she must find the claimant not disabled. *See* 20 C.F.R. § 404.1535; SSR 13-2p, 78 Fed. Reg. at 11,941. As here, where the ALJ finds that the claimant is not disabled regardless of his substance abuse, she need not conduct the DAA analysis.

Doc. 15 at 8, n.4. Plaintiff does not dispute this summary of the law. However, Plaintiff does argue that without doing a DAA analysis, the ALJ nonetheless used Plaintiff’s substance abuse as a basis to find Plaintiff not disabled. The Court will address this issue in the context of each of Plaintiff’s arguments below.

#### A. ALJ’s rejection of the treating physician’s opinion

Plaintiff argues that the ALJ improperly rejected the testimony of his treating

1 psychiatrist, Dr. Nagella. Doc. 12 at 5.

2 “Where a treating physician’s opinion is not contradicted by another doctor,  
3 it may be rejected only for clear and convincing reasons. *Thomas v. Barnhart*,  
4 278 F.3d 947, 956-57 (9th Cir.2002). However, the ALJ can reject the opinion  
5 of a treating physician in favor of the conflicting opinion of another examining  
6 physician “if the ALJ makes ‘findings setting forth specific, legitimate reasons  
7 for doing so that are based on substantial evidence in the record.’ ” *Id.* at 957  
8 (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.1989)).”

9 *Connett v. Barnhart*, 340 F.3d 871, 874 (9<sup>th</sup> Cir. 2003).

10 In this case, Dr. Nagella treated Plaintiff on March 12, 2010, and diagnosed Plaintiff  
11 with various mental limitations. Doc. 11-3 at 22. The ALJ rejected Dr. Nagella’s diagnosis  
12 for two reasons. First, the ALJ found that Dr. Nagella accepted Plaintiff’s subjective  
13 complaints without regard to Plaintiff’s on-going substance abuse. Doc. 11-3 at 23. Second,  
14 the ALJ found that Dr. Nagella’s opinion was not supported by the greater record, regardless  
15 of Plaintiff’s substance abuse. *Id.*

16 The record in this case reveals that Plaintiff has a long and significant history of  
17 substance abuse. Doc. 11-3 at 19 (finding a history of Plaintiff abusing heroin,  
18 methamphetamine, marijuana, alcohol, and Seroquel (obtained from a friend), and misuse  
19 of Plaintiff’s own prescription medications). However, as the Government noted in footnote  
20 4 of its brief, the ALJ determined that even while using all of these drugs, Plaintiff was not  
21 disabled. Therefore, the ALJ did not have to do a DAA analysis. Conversely, Plaintiff  
22 argues that if his drug use was the basis to discredit, for example, the opinion of his treating  
23 physician, then the ALJ’s conclusion that Plaintiff is not disabled regardless of his drug  
24 abuse is inconsistent reasoning; and, therefore, there is a lack of substantial evidence to  
25 support the ALJ’s ultimate decision. Doc. 12 at 5.

26 Turning to the ALJ’s second reason for rejecting Dr. Nagella’s testimony, the ALJ  
27 found it was not supported by the record as a whole. Specifically, the ALJ noted that the  
28 November 2011 progress notes from the West Yavapai Guidance Center (“WYGC”) showed  
Plaintiff had far higher functioning than Dr. Nagella’s opinion. Doc. 11-3 at 23. Because  
this was also a treating source for Plaintiff (*id.* at 16), the ALJ was correct to compare the  
treating source medical information and to decide which source to credit. *See Andrews*, 53

1 F.3d at 1039. Further, the ALJ also credited the state agency reviewing physicians over Dr.  
2 Nagella because the state agency physicians' findings were consistent with the record as a  
3 whole, including the WYGC's progress notes and Plaintiff's own reports of his daily  
4 activities. *Id.*

5 Thus, the Court finds the ALJ set forth specific and legitimate reasons supported by  
6 substantial evidence of record for not crediting Dr. Nagella's opinion. As a result, the Court  
7 need not consider the ALJ's alternative reason for rejecting Dr. Nagella's opinion.

8 **B. The ALJ's summary of Dr. Gill's opinion**

9 Plaintiff argues that the ALJ gave "greater weight" to the opinion of examining  
10 physician, Dr. Gill, but mis-characterized Dr. Gill's opinion. Doc. 12 at 7. Specifically, the  
11 ALJ stated that greater weight was given to Dr. Gill's opinion, "to the extent [the opinion]  
12 supports a finding that claimant can perform simple and repetitive tasks on a regular and  
13 sustained basis with limited social contact in the workplace." Doc. 11-3 at 12. On appeal,  
14 Plaintiff argues that Dr. Gill's opinion, taken as a whole, does not support that Plaintiff can  
15 perform simple and repetitive tasks on a sustained basis. Doc. 12 at 7.

16 The ALJ is responsible for resolving conflicts and ambiguities in the evidence, not this  
17 Court. *See Andrews*, 53 F.3d at 1039. Further, if the evidence is susceptible to more than  
18 one rational interpretation, one of which supports the ALJ's decision, then this Court will  
19 affirm the decision. *Id.* at 1040.

20 Here, the ALJ finds that Dr. Gill's assessment supports a conclusion, specifically that  
21 Plaintiff "can perform simple and repetitive tasks on a regular and sustained basis with  
22 limited social contact in the workplace." Doc. 11-3 at 12. The Court has reviewed Dr. Gill's  
23 assessment. Doc. 11-9 at 72-80. The Court finds that Dr. Gill's assessment, while subject  
24 to more than one interpretation, is consistent with the ALJ's conclusion. Therefore, this  
25 Court will not substitute its judgment for that of the ALJ. Accordingly, the Court will not  
26 reverse the ALJ on this basis.

27 **C. Plaintiff's symptom testimony**

28 Plaintiff claims the ALJ erred in rejecting his testimony regarding his symptoms. This

1 Court has held that:

2 An ALJ must engage in a two-step analysis to determine  
 3 whether a claimant's testimony regarding subjective pain or  
 4 symptoms is credible. *Lingenfelter*, 504 F.3d at 1035–36. First,  
 5 as a threshold matter, “the ALJ must determine whether the  
 6 claimant has presented objective medical evidence of an  
 7 underlying impairment ‘which could reasonably be expected to  
 8 produce the pain or other symptoms alleged.’ ” *Id.* at 1036  
 9 (quoting *Bunnell*, 947 F.2d at 344). The claimant is not required  
 10 to show objective medical evidence of the pain itself or of a  
 11 causal relationship between the impairment and the symptom.  
 12 *Smolen*, 80 F.3d 1273, 1282 (9th Cir. 1996). Instead, the  
 13 claimant must only show that an objectively verifiable  
 14 impairment “could reasonably be expected” to produce the  
 15 claimed pain. *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*,  
 16 80 F.3d at 1282); *see also* SSR 96–7p at 2; *Carmickle*, 533 F.3d  
 17 at 1160–61 (“reasonable inference, not a medically proven  
 18 phenomenon”). If the claimant fails this threshold test, then the  
 19 ALJ may reject the claimant's subjective complaints. *See*  
 20 *Smolen*, 80 F.3d at 1281 (citing *Cotton v. Bowen*, 799 F.2d 1403  
 21 (9th Cir. 1986) (reaffirmed in *Bunnell*, 947 F.2d 341)).

22 Second, if the claimant meets the first test, then “the ALJ  
 23 ‘may not discredit a claimant's testimony of pain and deny  
 24 disability benefits solely because the degree of pain alleged by  
 25 the claimant is not supported by objective medical evidence.’ ”  
 26 *Ortega v. Shalala*, 50 F.3d 748, 749–750 (9th Cir. 1995)  
 27 (quoting *Bunnell*, 947 F.2d at 346–47). Rather, “unless an ALJ  
 28 makes a finding of malingering based on affirmative evidence  
 thereof,” the ALJ may only find the claimant not credible by  
 making specific findings supported by the record that provide  
 clear and convincing reasons to explain his credibility  
 evaluation. *Robbins*, 466 F.3d at 883 (citing *Smolen*, 80 F.3d at  
 1283–84 (“Once a claimant meets [step one] and there is no  
 affirmative evidence suggesting she is malingering, the ALJ  
 may reject the claimant's testimony regarding the severity of her  
 symptoms only if he makes specific findings stating clear and  
 convincing reasons for doing so.”)); *see also, e.g., Lingenfelter*,  
 504 F.3d at 1036 (if the ALJ has found no evidence of  
 malingering, then the ALJ may reject the claimant's testimony  
 “only by offering specific, clear and convincing reasons for  
 doing so”).

23 *Trembulak v. Colvin*, No. CV-12-02420-PHX-JAT, 2014 WL 523007, at \*8–9 (D. Ariz. Feb.  
 24 10, 2014)).

25 In this case, the ALJ found that Plaintiff had, “medically determinable impairments  
 26 [that] could reasonably be expected to cause the alleged symptoms.” Doc. 11-3 at 19. Thus,  
 27 the ALJ could reject Plaintiff's self-reported symptoms only if the ALJ found evidence of  
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1 malingering or made specific findings supported by the record which provided clear and  
2 convincing reasons to explain the ALJ's credibility evaluation.

3 First, the ALJ suggested that there was malingering. *Id.* Specifically, the ALJ stated:

4 "one has to question [Plaintiff's] motivation for work in light of his history of  
5 intravenous drug abuse including heroin and methamphetamine, as well as  
6 continued marijuana smoking. [Plaintiff] failed to differentiate between his  
alleged disability and his substance abuse. [Plaintiff] appears motivated to  
continue using drug, as he even misuses prescription medication."

7 *Id.*

8 In response to this finding, Plaintiff argues on appeal that it was inappropriate for the  
9 ALJ to consider his drug abuse without doing a DAA analysis. Doc. 12 at 8-9. In sum, what  
10 Plaintiff appears to be arguing is that the ALJ may not consider Plaintiff's drug use in any  
11 way unless the ALJ is going to presume that Plaintiff is disabled and do a DAA analysis.  
12 The Court has found nothing in the social security regulations cited by the parties that  
13 suggests that the ALJ may not consider Plaintiff's drug use as a factor in the ALJ's analysis  
14 unless the ALJ is going to find the claimant disabled. Said a different way, while the CFRs  
15 require drug use to be considered when a claimant is found to be disabled, neither party has  
16 cited anything that requires the ALJ to wholly pretend drug use does not exist in making the  
17 initial disability determination.

18 Nonetheless, the Court has done its own research and determined that the Ninth  
19 Circuit Court of Appeals has held that an ALJ committed error when the ALJ, at step two,  
20 determined that a claimant's behavioral and emotional problems were the result of his  
21 alcohol abuse and not "independently severe or disabling." *Bustamante v. Massanari*, 262  
22 F.3d 949, 954-55 (9<sup>th</sup> Cir. 2001). In conclusion the Court of Appeals held, "If, and only if,  
23 the ALJ found that Bustamante was disabled under the five-step inquiry, should the ALJ have  
24 evaluated whether Bustamante would still be disabled if he stopped using alcohol." *Id.* at  
25 955.

26 Thus, the *Bustamante* decision suggests that the ALJ must make the initial disability  
27 determination without regard to whether the alcohol or drug abuse is the cause of the  
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1 symptoms. However, what *Bustamante* does not speak to is whether the ALJ can consider  
2 drug using in making a credibility determination.

3 Here, the ALJ clearly considered Plaintiff's long history of drug use in evaluating  
4 whether Plaintiff was motivated to return to work. Further, the ALJ found that Plaintiff's  
5 focus on drug use was his true motivation for not working. The Court finds this was not  
6 improper, and was a finding of malingering sufficient to reject Plaintiff's subjective  
7 complaint testimony.

8 Alternatively, even if the ALJ erred in relying on Plaintiff's drug use in evaluating his  
9 credibility, the ALJ gave several other reasons for finding Plaintiff not credible. First, the  
10 ALJ found that Plaintiff's testimony about the intensity, persistence and limiting effects of  
11 his symptoms was inconsistent with his testimony about his daily activities and his overall  
12 abilities. Doc. 11-3 at 19. Second the ALJ found that Plaintiff's testimony was not reliable  
13 because it was inconsistent regarding Plaintiff's drug and alcohol abuse (showing that  
14 Plaintiff was an inaccurate historian about himself). *Id.* Third, Plaintiff testified  
15 inconsistently regarding how his last job ended. *Id.* Fourth, Plaintiff was not cooperative in  
16 returning his paperwork regarding his state application for disability benefits. *Id.* at 20.  
17 Fifth, Plaintiff's testimony regarding his symptoms was inconsistent with the objective  
18 clinical and laboratory evidence in the record. *Id.*

19 The Court finds that these are clear and convincing reasons to find Plaintiff not  
20 credible and to reject his symptom testimony. On appeal, Plaintiff does not argue that these  
21 are not clear and convincing reasons to reject Plaintiff's testimony. Instead, Plaintiff  
22 attempts to take each reason in turn and explain why the reason is not supported by  
23 substantial evidence of record. Thus, Plaintiff argues that this Court should review the record  
24 and reject each of the ALJ's reasons as unsupported by the record.

25 As listed above, first the ALJ found that Plaintiff's testimony about the intensity,  
26 persistence and limiting effects of his symptoms was inconsistent with his testimony about  
27 his daily activities and his overall abilities. On appeal, Plaintiff does not dispute this factual  
28 finding. Instead, makes a legal argument that a claimant having some limited daily activities



1 does not mean the claimant is not disabled. Doc. 12 at 9 (citing *Robinson v. Barnhart*, 469  
2 F.Supp.2d 793 (D. Ariz. 2006). In this case, however, the ALJ did not state Plaintiff was not  
3 disabled because he had limited daily activities. Instead the ALJ found that Plaintiff's daily  
4 activities as recounted by Plaintiff, including maintaining personal care, eating, smoking  
5 marijuana, riding his bike, eating out, collecting food at a food bank, and doing some house  
6 work, were inconsistent with Plaintiff's testimony regarding the severity of Plaintiff's  
7 symptoms. Doc. 11-3 at 20. Thus, the ALJ found Plaintiff not credible for this reason,  
8 which is different than finding the Plaintiff not disabled for this reason. The Court finds this  
9 reason is supported by substantial evidence of record. *See generally Berry v. Astrue*, 622  
10 F.3d 1228, 1235 (9<sup>th</sup> Cir. 2010) (finding that claimant's self-reported daily activities  
11 undermined claimant's credibility regarding his claims about the severity of his limitations).

12 Second, the ALJ found Plaintiff testified inconsistently about his prior drug use. On  
13 appeal, Plaintiff does not factually dispute this finding. Instead, Plaintiff makes a legal  
14 argument that it was inappropriate for the ALJ to consider his drug use without doing a DAA  
15 assessment. The Court finds it was not error for the ALJ to consider inconsistencies in  
16 Plaintiff's testimony as evidence that he was not credible. *See generally Thomas v. Barnhart*,  
17 278 F.3d 947, 959 (9<sup>th</sup> Cir. 2002) (discounting the claimant's credibility because she  
18 presented conflicting information about her drug and alcohol use). Therefore, the Court finds  
19 this reason is supported by substantial evidence of record.

20 Third, the ALJ found that Plaintiff gave inconsistent testimony regarding how his last  
21 job ended, thereby undermining his credibility. Specifically, the ALJ found that Plaintiff told  
22 the WYGC that he was fired from his job, but testified before the ALJ that he quit his job.  
23 Doc. 11-3 at 19. Plaintiff factually disputes this finding on appeal as follows: "The ALJ  
24 asked 'So you actually quit the job then?' and [Plaintiff] answered 'Yes, you could say that.'  
25 [citation omitted]. It was the ALJ that indicated [Plaintiff] quit his job so there is no  
26 discrepancy." Doc. 12 at 9.

27 The Court finds this argument disingenuous. Specifically, Plaintiff argues on appeal  
28 that the ALJ asking a question amounts to the ALJ making up facts even though the Plaintiff



1 answered yes to the question. Clearly this finding of the ALJ is supported by the record —  
2 indeed by Plaintiff's own testimony — and Plaintiff's claim of error on appeal is wholly  
3 unfounded.

4 Fourth, the ALJ found Plaintiff was not credible because Plaintiff was not cooperative  
5 in returning his paperwork regarding his state application for disability benefits. On appeal,  
6 Plaintiff does not dispute that he did not turn in his paperwork in a timely fashion. Instead,  
7 he argues that the ALJ improperly weighed this evidence because his failure to return his  
8 paperwork should have been weighed as evidence of his problems. Doc . 12 at 9-10.

9 It is the ALJ's duty to resolve ambiguities in the evidence and assess credibility. *See*  
10 *Andrews*, 53 F.3d at 1039. This Court cannot substitute its judgment for the ALJ simply  
11 because the evidence could be given more than one possible meaning. *See Young*, 911 F.2d  
12 at 184. Accordingly, the Court find that there is substantial evidence of record to support the  
13 ALJ's finding on this fourth reason for finding Plaintiff not credible.

14 Fifth and finally the ALJ discredited Plaintiff because Plaintiff's symptom testimony  
15 was inconsistent with the medical evidence. On appeal, Plaintiff makes one factual claim of  
16 error and one legal claim of error. Regarding the legal claim, Plaintiff argues that the ALJ  
17 cannot discredit a claimant's testimony solely because it is not supported by objective  
18 medical evidence. Doc. 12 at 10 (citing *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
19 1998)). Here, the ALJ did not discredit Plaintiff because there was not objective medical  
20 evidence to support his symptoms. Instead, the ALJ discredited Plaintiff because his  
21 testimony about the severity of his symptoms was inconsistent with the objective evidence.  
22 Accordingly, the Court finds the ALJ did not commit any error on this basis.

23 As to the claim of factual error, Plaintiff argues that the ALJ mis-characterized Dr.  
24 Towns' notes. The ALJ's recounts Dr. Towns' notes as follows: "Progress notes from Dr.  
25 Town[]s between May and November 2011 show the claimant had normal range of motion,  
26 strength, muscle tone, sensation, and deep tendon reflexes in all extremities, with normal gate  
27 and station." Doc. 11-3 at 20. The ALJ then concluded that these progress notes were  
28 inconsistent with Plaintiff's testimony regarding his upper right extremity and neck

1 complaints. *Id.* Plaintiff argues on appeal that Dr. Towns proscribed pain medication and  
2 performed a cervical nerve block, which Plaintiff argues are consistent with Plaintiff's  
3 testimony. Doc. 12 at 10.

4 As discussed above, the ALJ is responsible for reviewing and resolving conflicts in  
5 the medical testimony. *Andrews*, 53 F.3d at 1039. Plaintiff does not dispute that everything  
6 the ALJ recounted is in Dr. Towns' notes. Plaintiff instead disputes how the ALJ interpreted  
7 that medical evidence and asks this Court to substitute its judgment for that of the ALJ to  
8 conclude that there is no substantial evidence to support the ALJ's decision. However, this  
9 Court cannot substitute its judgment for the ALJ. *See generally Flaten v. Sec'y of Health and*  
10 *Human Servs.*, 44 F.3d 1453, 1457 (9<sup>th</sup> Cir. 1995). Thus, because the ALJ accurately  
11 recounted Dr. Towns' progress notes, which were inconsistent with Plaintiff's testimony  
12 about the severity of his limitations, the Court finds there is substantial evidence to support  
13 the ALJ's decision. Accordingly, the Court finds no error on this basis.

14 **D. Plaintiff's drug abuse**

15 As discussed above, although Plaintiff did not raise the ALJ's failure to do a DAA as  
16 a specific claim of error on appeal, throughout his brief Plaintiff suggests that the ALJ's  
17 failure to do a DAA analysis was error. As also discussed above, the Ninth Circuit Court of  
18 Appeals has held that it is error for the ALJ to rely on a plaintiff's alcoholism as a basis to  
19 find him not disabled at Step 2. *Bustamante*, 262 F.3d at 954-55.

20 Preliminarily, as further discussed above, the Court notes that neither party has cited,  
21 nor has the Court located, a case or regulation that prohibits an ALJ from considering drug  
22 and alcohol abuse in assessing a claimant's credibility. Thus, to the extent the ALJ  
23 considered Plaintiff's drug abuse in this case as a factor bearing on his credibility, the Court  
24 finds no error.

25 To the extent the ALJ considered Plaintiff's drug abuse in other respects in the ALJ's  
26 determination that Plaintiff is not disabled, such consideration appears to run afoul of  
27 *Bustamante*, 262 F. 3d at 955. The Court has framed this issue as "to the extent" because  
28 whether the ALJ considered Plaintiff's drug abuse is somewhat ambiguous in this case.

1 Specifically, in conclusion the ALJ states: “Because the claimant is not disabled, regardless  
2 of his continued polysubstance abuse, his addictions are not contributing factors nor material  
3 in any way to a finding of disability in this matter.” Doc. 11-3 at 25. Based on this sentence,  
4 it would appear that the ALJ did not consider Plaintiff’s drug abuse and there was no error.

5 However, in the next two sentences, the ALJ goes on to state: “The undersigned finds  
6 the claimant’s mental impairments are treatable when he abstains from drugs and alcohol and  
7 takes prescribed medications as directed. The claimant bears the burden of proving that  
8 alcoholism and drug addiction are not a contributing factor material to the determination of  
9 disability, and the undersigned finds he has failed to do so. see [sic] James Ball v. Massanari,  
10 254 F.3d 817 (9<sup>th</sup> Cir. 2011).” Doc. 11-3 at 25.

11 In *Ball*, the Ninth Circuit Court of Appeals held that the ALJ is not required to  
12 “separate out” a claimant’s drug or alcohol abuse at Step 2 unless the record indicates there  
13 are other non-substance-abuse-related impairments that are “severe” and would pass Step 2.  
14 254 F.3d at 823. Based on the ALJ’s first sentence, quoted above, it appears that in this case  
15 the ALJ found that Plaintiff had no such severe impairments and therefore, under *Ball*, the  
16 ALJ did not have to separate out the abuse (or do a DAA analysis). Accordingly, there was  
17 no legal error.

18 However, the second and third sentences quoted above appear to be more along the  
19 line of either a DAA analysis or a conflating of the DAA analysis with the initial  
20 determination of disability. To the extent these sentences reflect an in the alternative DAA  
21 analysis, there was no error. To the extent these sentences reflect that the ALJ considered  
22 Plaintiff’s drug abuse in finding him not disabled, such consideration is likely error under  
23 *Bustamante*, 262 F.3d at 955. An error of this nature, however, is subject to a harmless error  
24 review. See *Parra v. Astrue*, 481 F.3d 742, 747 (9<sup>th</sup> Cir. 2007).

25 In this case, as discussed above, the ALJ gave specific non-drug-use reasons  
26 supported by substantial evidence of record, to find Plaintiff not disabled. These reasons,  
27 standing alone, are an adequate basis to affirm the decision of the ALJ. Therefore, to the  
28 extent the ALJ relied on alternative reasons based on Plaintiff’s drug use, any error was

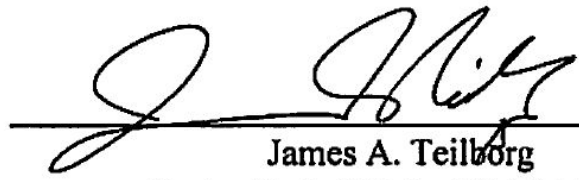
1 harmless. In other words, the Court will affirm the ALJ's decision based on only the ALJ's  
2 cited non-drug-use-related reasons for each of the ALJ's findings and the ALJ's ultimate  
3 decision.

4 **IV. Conclusion**

5 Based on the foregoing, the Court finds that the ALJ did not commit any legal error  
6 and that the ALJ's decision is supported by substantial evidence of record. Accordingly,

7 **IT IS ORDERED** that the decision of the ALJ is affirmed and the Clerk of the Court  
8 shall enter judgment accordingly.<sup>1</sup>

9 DATED this 19<sup>th</sup> day of May, 2014.

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14 James A. Teilborg  
15 Senior United States District Judge  
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28 <sup>1</sup> To the extent a mandate is required, the judgment shall serve as the mandate in this case.